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Nos. 21, 22, 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY, and
PHILADELPHIA ELECTRIC COMPANY,
Petitioners,

v.

CALLERY PROPERTIES, INC., ET AL.,
Respondents.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

CALLERY PROPERTIES, INC., ET AL.,
Respondents.

FEDERAL POWER COMMISSION,
Petitioner,

v.

CALLERY PROPERTIES, INC., ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT OCEAN DRILLING & EXPLORATION COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 619-42) is reported at 335 F. 2d 1004. The opinions and orders of the Federal Power Commission (R. 549-93, 606-17) are reported at 30 FPC 283 and 682.

JURISDICTION

The judgment of the court of appeals reversing the Federal Commission's order and remanding the proceedings was entered on August 14, 1964 (R. 643). Orders were issued on November 6 and 12, 1964, extending the time for filing petitions for writs of certiorari in Nos. 26 and 32 until November 23 and December 12, 1964, respectively. The petitions were filed on November 10 (No. 21), November 12 (No. 22), November 23 (No. 26) and December 11, 1964 (No. 32). Orders were entered granting the petitions in all four cases on March 8, 1965 (R. 645-647). 380 U.S. 931.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. May the Federal Power Commission in a certificate proceeding under Section 7(e) of the Natural Gas Act attach price-reducing conditions to producer-applicants' certificates without considering cost, economic, and other evidence tendered by the producer-applicants to show why the present and future public convenience and necessity is best served by granting unconditioned certificates?

2. May the Federal Power Commission, without notice, hearing, or any supporting evidence, impose a condition on permanent certificates of public convenience and necessity forbidding the filing of contractually authorized rate increases above a specified level?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (Sections 4 and 7(c) and (e), 52 Stat. 821, as amended, 15 U.S.C. 717-717w) are reprinted in the Appendix to the Federal Power Commission's brief, pp. 61-65.[1]

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[1] References throughout this brief to sections "4", "5" or "7" refer to sections of the Natural Gas Act, 15 U.S.C. 717c, 717d, 717f.

STATEMENT

The Statement contained in the Federal Power Commission's (Commission's) brief fairly outlines the background of this case. Certiorari was granted in Nos. 21, 22 and 32[2] on the two questions restated and presented above and on a third question as to the measure of refunds in the event it is determined that the Federal Power Commission has authority under Section 7(e) of the Natural Gas Act to require producers to refund amounts previously collected pursuant to unconditional permanent certificates.[3] This brief is directed to the two question noted above.[4]

The court below did not reach the questions raised by Ocean Drilling & Exploration Company (ODECO) pertaining to the manner in which the Commission determined the "in-line" price to support its 20¢ per Mcf price condition

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[2] Petitioners in No. 21 are The United Gas Improvement Company, Long Island Lighting Company, and the Philadelphia Electric Company, all privately owned distributing companies who, of course, have a proprietary interest in seeing lower gas prices. These companies will be referred to singly as "UGI *et al*". Petitioner in No. 22 is the Public Service Commission of the State of New York which, as the name implies, is the state agency in New York responsible for utility rates. This state commission will be referred to singly as "New York". For simplicity, UGI *et al* and New York will be referred to collectively as the "Intervenors". The Commission is Petitioner in No. 32.

[3] ODECO as Petitioner in No. 26 has submitted a brief to support its position that under Section 7(e) of the Natural Gas Act the Commission has no authority to award reparations of amounts collected pursuant to unconditional certificates of public convenience and necessity. No. 26 has been consolidated with Nos. 21, 22 and 32 (R. 659).

[4] Assuming that the Commission has the power to order refunds, ODECO adopts the briefs of the other respondents in Nos. 21, 22 and 32 as to the measure of refunds.

or the error in the Commission's determination to require ODECO to pay interest on the refunds which it ordered. (R. 641, 640) Although the Commission as Petitioner in No. 32, now asks this Court to pass upon these undecided issues, they were not presented in the petitions in Nos. 21, 22 and 32 and were not included in the orders granting certiorari. Therefore, ODECO is not responding to the arguments directed to the "in line" price and interest questions. However, if the Court nevertheless decides to pass upon these questions ODECO requests the opportunity to submit a supplemental brief.

SUMMARY OF ARGUMENT

1. Under Section 7(e) of the Natural Gas Act a certificate applicant has the *burden* to show that his proposed price is required by the present or future public convenience and necessity. Accordingly, under the statute the certificate applicant must be given the *opportunity* to meet this burden. In the orders under review the Commission denied the certificate applicants the *opportunity* to meet their statutory *burden* by excluding all evidence except that related to other certified sales in the area.

2. The Commission does not have authority under the Natural Gas Act to impose a condition on permanent certificates of public convenience and necessity forbidding the filing of contractually authorized price increases in accordance with Section 4 of the Natural Gas Act. Further, the record is devoid of any evidence to support the 23.55¢ per Mcf price increase moratorium imposed by the Commission on the certificates issued in this case.

ARGUMENT

I.

THE COMMISSION ERRED IN REJECTING PROFFERED EVIDENCE RELEVANT TO A DETERMINATION OF THE PUBLIC CONVENIENCE AND NECESSITY

This case involves the failure of the Commission to afford producer-applicants the opportunity to explain the "reason why" their proposed contract prices are in the present and future public convenience and necessity even if they are higher than prices previously certificated by the Commission in the same area. The Commission takes the unqualified position that, in a Section 7 certificate proceeding, the only relevant evidence is that relating to prices previously certificated in the area and that it is not required to consider any other evidence bearing on the public convenience and necessity.

After erroneously concluding that ODECO's proposed price was not "in line" with prices previously certificated in Southern Louisiana,[5] the Commission refused to receive and consider evidence tendered by ODECO which would have explained the "reason why" its initial contract price was in the present and future public convenience and necessity. The Commission's refusal to consider such evidence was predicated *solely* on administrative convenience. The court below reversed the Commission, agreeing with ODECO that "The Commission must, however, hear and evaluate all relevant evidence bearing on public convenience and necessity when it is urged, or held,[31] that the proposed price is out of line." (R. 632).

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[5] ODECO's contracts were executed in 1958. The 18.5¢ per Mcf price for 1957-1958 contracts which the Commission found to be "in-line" constituted approximately the *lower* 25% by volume of the contracts executed during those years. (R. 297).

1. *CATCO* and its Progeny

Since *CATCO*[6] is the only producer certificate case involving the price issue which this Court has considered since its first *Phillips*[7] decision, each petitioner relies on this important decision in discussing what evidentiary criteria must be considered in certificate proceedings.[8] *CATCO* involved a sale by four producers to Tennessee Gas Transmission Company of 1.67 trillion cubic feet of natural gas from offshore Louisiana at an initial price of 22.4¢ per Mcf including tax reimbursement of 1¢ per Mcf. The Commission had twice refused to issue a certificate to the producers at this price and the producers had threatened not to dedicate this large gas supply to interstate commerce. Finally, Tennessee notified the Commission that if a certificate was not issued to the producers this needed gas supply would be forever lost to the interstate market. On the third attempt the Commission granted certificates to the producers at their contract prices on "the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas . . ." 360 U.S. 386.

This Court reversed the Commission, describing the *CATCO* record thusly:

> "Our examination of the record here indicates that there was insufficient evidence to support a finding of public convenience and necessity prerequisite to the issuance of the permanent certificates. The witnesses tendered developed little more information than was included in the printed contracts. As the proposed contract price was higher than any paid by Tennessee,

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[6] *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378 (1959).

[7] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

[8] In describing *CATCO* Judge Brown once stated "Catco came up on a bare bones record with some macabre-like implications." *United Gas Improvement Co.* v. *FPC*, 290 F. 2d 133, 141 (5th Cir.), *cert. denied*, 368 U. S. 823 (1961).

including offshore production in the West Delta area of Louisiana, it is surprising that evidence, if available, was not introduced as to the relative costs of production in the two submerged areas. Moreover, the record indicates that the proposed price was some 70% higher than the weighted average cost of gas to Tennessee; still no effort was made to give the 'reason why'." 360 U.S. at 392-93.

This Court further held, that under Section 7 of the Natural Gas Act the Commission is not required to make a Section 4 or 5 just and reasonable rate determination, but that the "inordinate delay presently existing in the processing of §5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under §7". 360 U.S. at 391.

In response to the teachings of *CATCO*, the courts of appeals[9] reversed four Commission certifications of sales from Southern Louisiana based upon records completed prior to the issuance of the *CATCO* opinion.[10] The orders of the Commission under review in these four cases were issued after *CATCO* and in each the Commission concluded that the applicants met the *CATCO* standards. But

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[9] *Public Serv. Comm'n* v. *FPC*, 287 F. 2d 146 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 880 (1961); *United Gas Improvement Co.* v. *FPC*, 290 F. 2d 133 (5th Cir.), *cert. denied*, 368 U.S. 823 (1961); *United Gas Improvement Co.* v. *FPC*, 290 F. 2d 147 (5th Cir.), *cert. denied*, 366 U.S. 964 (1961); *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U.S. 879 (1961).

[10] Six weeks after *CATCO* this Court summarily reversed the Court of Appeals for the Third Circuit which had affirmed a Commission order certificating new sales in Southern Louisiana which was entered prior to *CATCO*. *United Gas Improvement Co.* v. *FPC*, 269 F. 2d 865, *vacated*, 361 U.S. 195 (1959), ". . . with directions to remand the case to the Federal Power Commission for reconsideration and redetermination in the light of *Atlantic Refining Co.* v. *Public Service Com. of New York*, 360 U.S. 378, 3 L. ed. 2d 1312, 79 S. Ct. 1246."

as the Court of Appeals for the District Court of Columbia stated:[11]

> "The Supreme Court noted, in the Catco case, that the record before it supplied 'little more information than was [contained] in the printed contracts.' Id., 360 U.S. at page 392, 79 S. Ct. at page 1256. It does not appear to us that the record presently under review is materially better than that found to be deficient in Catco. Although the order now before us was handed down a month after the Supreme Court had spoken in Catco, the evidence was taken before the court's opinion was rendered, and thus before it had become known that additional explanatory proof would be required to support inflated prices." 287 F. 2d at 149-50.

Likewise, the Court of Appeals for the Fifth Circuit in reversing one of the *CATCO* progeny noted:[12]

> "We do not attempt to determine what the 'line' is on this record. We have no doubt that in this case the price of 23.8 cents per Mcf, including the tax reimbursement,[1] was out of line as the term was used by the Supreme Court. The only evidence on this record that supports such 'out of line' price is the fact that it was negotiated at arms' length and was required by the intense competition. This, as we have said, is not enough. *It is clearly incumbent on the proponent of such a rate to make some showing of the 'reason why' (as it was expressed in the CATCO opinion) 21½ cents, excluding tax, is the proper initial rate in 1958 when the parties were freely contracting in 1954 at half that figure.*" (Emphasis added). 290 F. 2d at 138.

ODECO's certificate applications were originally involved in the Commission's order reversed by the Court of Appeals

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[11] *Public Serv. Comm'n* v. *FPC*, 287 F. 2d 146 (D.C. Cir. 1960), *cert. denied* 365 U.S. 880 (1961).

[12] *United Gas Improvement Co.* v. *FPC*, 290 F. 2d 133 (5th Cir.) *cert. denied*, 368 U.S. 823 (1961).

for the District of Columbia.[13] That court specifically remanded the case to the Commission "for further proceedings in which the producer applicants may, if they so choose, either augment the record so as to support a certification without price condition, or seek a certification appropriately conditioned".[14]

2. ODECO's Attempt to Augment the Record

The reversals spawned by *CATCO* returned to the Commission where all were eventually consolidated and set for hearing (R. 409-21). Certain lessons seemed evident from the reversals. No longer would producers be granted permanent certificates at prices substantially above prices previously paid by their pipeline purchaser merely by showing that their contracts were negotiated at arms' length; that another pipeline had offered approximately the same price for the gas; that their proposed price was "in keeping with numerous other certified sales in the area",[15] and that if the Commission did not grant the certificate at the proposed price that the gas might not be dedicated to interstate commerce. It also seemed clear that if the proposed price was substantially higher than the prices theretofore paid by the pipeline purchaser, that the producer was going to have to explain the "reason why" the increased price was in the present and future public convenience and necessity. At the same time *CATCO* expressly held, and the inferior courts echoed, that a Section 7 producer certificate proceeding was not a Section 4 or 5 rate proceeding and that the Commission was not required to determine a just and reasonable price or conduct a rate hearing to determine the appropriate price in a certificate proceeding.

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[13] *Public Serv. Comm'n* v. *FPC*, 287 F. 2d 146, 150 (D.C. Cir. 1960) *cert. denied*, 365 U.S. 880 (1961).

[14] *Public Serv. Comm'n* v. *FPC*, *supra* note 13.

[15] 287 F. 2d at 150.

After remand, the immediate unanswered question obvious to all was what kind of evidence and how much was required for a producer to receive a price higher than the prices previously paid by his pipeline purchaser.[16] The problem was compounded by the failure of the Commission to declare what type of evidence it envisioned was required by *CATCO* to support unconditional certification. Absent any guidance in the remanded proceedings ODECO presented the evidence summarized below.[17]

Company-wide financial requirements as shown by all domestic exploration and development activities conducted by ODECO from its inception in 1953 to December 31, 1961. On the basis of three alternative approaches, ODECO compared costs and revenues over the life of all oil and gas reservoirs found by ODECO. Each of these comparisons reflected a substantial revenue deficiency (R. 356-59). This evidence clearly demonstrates on the basis of ODECO's revenue requirements the 'reason why' its initial contract price of 21.5¢ per Mcf, plus tax reimbursement of 2.05¢ per Mcf, is the proper initial price.

ODECO also participated with three other producers in a four-company economic analysis which demonstrated the

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[16] In reversing the unconditional certificates issued to ODECO, the Court of Appeals for the District of Columbia noted: "The Catco decision does not prescribe a standard of proof which must be satisfied to support an unconditional certification." *Public Serv. Comm'n* v. *FPC*, 287 F. 2d 146, 150 (1960), *cert. denied*, 365 U.S. 880 (1961).

[17] ODECO did have the benefit of the remanded *CATCO* decision issued January 22, 1962. *Continental Oil Co.*, Opinion No. 351, 27 FPC 96 (1962). In the remanded *CATCO* proceedings the Commission received and considered cost of service studies, a discounted cash flow study, reserve studies, evidence of drilling and operating costs, etc.

ever-increasing sums of money required for exploration and development operations in Southern Louisiana. In addition, ODECO helped sponsor industry-wide evidence relating to the increased cost of production and exploration, the decline in the ratio of gas supplies to production, the price advantage of natural gas over other competitive fuels for many years, and similar data for the United States and Louisiana.[18]

ODECO does not contend that the above evidence is the *sine qua non* of producer certificate proceedings. However, ODECO does contend that such evidence is relevant to a determination of the public convenience and necessity, particularly since it tends to show the increasing costs being incurred by ODECO and other producers which were reflected in the rising sales price level in Southern Louisiana. ODECO should have saved the time and expense, for the Commission upheld its Examiner's exclusion of all of the evidence described above. The Commission did not attempt to strike a balance between a full-blown rate proceeding and the "bare bones" records which led to the earlier reversals. Nor did the Commission afford ODECO and the other producers the opportunity to augment the record so as to support unconditional certification. Instead, the Commission decided not to allow *any* cost, economic, or other supporting evidence but relied solely on evidence of other certified sales in the area. To do this the Commission developed the "in-line" concept, concluding that it was *not* in the public convenience and necessity for a producer to sell gas in interstate commerce above the "line" even if

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[18] Obviously this evidence falls far short of the standard necessary to determine a just and reasonable rate. *Continental Oil Co.* Opinion No. 351, 27 FPC 96 (1962).

the producer by supporting evidence could justify a breach above the "line".[19]

3. The "In-Line" Concept

The most important aspect about the Commission's "in-line" concept is that the Commission takes the position that the "in-line" price is the public convenience and necessity price. The idea for determining an "in-line" price germinated with *CATCO* when this Court said:

> "Where the proposed price is not in keeping with the public interest because it is out of line . . ."[20]

The Ninth Circuit interpreted the "out of line" language as follows:

> " . . . the 'line' referred to in Catco may properly be referenced to relevant existing producer prices under which substantial amounts of natural gas move in interstate commerce."[21]

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[19] It is ironic that in 1959 the producers, to the dismay of the Intervenors, asked this Court's blessing of a procedure that ignored any explanation of the underlying basis for increased gas prices. Now in 1965, the Commission and Intervenors, to the dismay of the producers, ask this Court's blessing of the same type of procedure whereby the Commission refuses to consider any evidence to support increased gas prices and consequently issues certificates with price-reducing conditions. Further, it is interesting to note that counsel for UGI, in the oral argument in *United Gas Improvement Co.* v. *Continental Oil Co.*, ... U.S. ....., 14 L. Ed. 2d 466 (1965) advised the Court that, "Secondly, the real issue here should not be what the pipeline pays for the gas *but what the producers pay and what it costs them to bring the gas from the ground.* So unless the producers are made part of this record, and they are subject to regulation, you are going to have Texas Eastern trying to litigate this matter by having to prove what somebody else's costs were." (Transcript of Argument, p. 41).

[20] *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378, 391 (1959).

[21] *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817, 823 (9th Cir. 1960), *cert. denied*, 365 U.S. 879 (1961).

On brief in this case the Commission defines the "in-line" price as:

> ". . . the highest price at which substantial amounts of gas had been certificated to enter the market under other contemporaneous certificates not themselves subject to court review or otherwise suspect."[22]

Regardless of the definition used, it is more important to determine what the Commission does in actual practice. To begin with, the Commission staff prepares an exhibit listing all of the contracts in a particular geographical area filed with the Commission for a certain time period — in the instant case for the years 1957-1958. This exhibit contains the names of the buyers and sellers, contract and certificated prices and some of the quality specifications (sulphur, water, and carbon dioxide content, etc.). It does not contain any elements of cost or any data such as drilling depths, size of reserves, ability of the reserves to produce, delivery conditions, supply and demand factors, or any evidence to show the price necessary for the maintenance of an adequate gas supply.[23] The Commission then determines the "line" on the basis of the permanently certificated prices contained in the exhibit.[24]

It is extremely important to understand at this point what the Commission does because it explains why the same Intervenors who asked for reversal in this Court six and one-half years ago in *CATCO* are now defending the Commission on the same type of inadequate record. The Commission does not examine the actual contract prices negotiated by the parties free of governmental restraint which would at least have some materiality as to what the economic interplay of the free marketplace had created. The Commission only looks to what *it* has done

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[22] Brief for FPC, p. 17.

[23] For example, under the Commission "in-line" system, gas produced from offshore Louisiana at depths of 15,000 feet receives the same price as gas produced onshore at depths of 3,000 feet. Therefore of necessity, the Commission compares "apples with oranges".

[24] If there is an insufficient number of permanently certificated prices, the Commission examines temporary certificates.

before, *i.e.*, to certificated prices. In the first contested hearing for producer certificates in a particular geographical area the only permanent certificates which are available to be examined are those which the Intervenors have not previously contested, presumably because the price was satisfactory to them. Once an "in-line" price is determined, it perpetuates itself because the Commission will thereafter look to the prices previously permanently certificated as evidence of the price line in future proceedings. The circularity in the procedure is self-evident.[25] When you consider that the Commission and the Intervenors are contending that the "in-line" price and the "public convenience and necessity" price are the same, you reach the result that the public convenience and necessity price is the price which Intervenors do not oppose.[26] In this manner the Commission has abdicated to Intervenors the responsibility to determine prices consistent with the present and future public convenience and necessity. At the same time, use of this "in-line" price method also explains why the Intervenors do not want any other evidence offered to support higher prices in the record. It is a mathematical certainty that prices will be frozen at Intervenor-approved levels.[27]

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[25] The mechanical "in-line" price theory is discussed in Morris, *Recent Independent Producer Certificate Cases: The "Suspect Order" Rule*, 32 GEO. WASH L. REV. 489 (1964).

[26] For an excellent review of the Commission's present policies with regard to producer regulation including producer certificate cases see Ross, *The Area Rate Proceedings: An Unsettled Experiment in Public Control of Natural Gas Prices*, 18 Sw. L. J. 163 (1964). Mr. Ross was counsel for the Commission in *CATCO* and was also formerly counsel for United Gas Improvement Co., one of the Intervenors.

[27] The Commission eliminates many contracts at certain prices from consideration, on the basis that the contracts are the subject of litigation or that the price level in the contracts is the same level as prices in litigation. The effect of such an absurd attitude is that any price level contested by the Intervenors automatically eliminates any consideration of prices at that same level in a producer certificate proceeding. This system has resulted in the elimination of all prices above 18.5¢ per Mcf in determining the "in-line" price in Southern Louisiana causing a price freeze at that level from 1956 through 1962.

4. The Court Below

There are some statements in Petitioners' briefs describing the holding of the court below on the exclusion of evidence question which may be misleading. The court below did not hold that the Commission should not determine an "in-line" price; indeed, the court below expressly recognized that the in-line price "is an important, sometimes decisive factor." (R. 625). What the court below held was that the Commission does not satisfy its statutory obligation by merely determining an "in-line" price. The Commission is required by the Natural Gas Act to determine the price that is consistent with the *present* and *future* public convenience and necessity, which entails a broader inquiry than simply examining *past* regulatory action as exemplified by "other certified sales in the area".

In reversing the Commission for its refusal to consider any cost, economic or other supporting evidence, the court below properly characterized the Commission's and Intervenor's philosophy:

> "As though Catco began and ended with 'in-line' the Commission and the intervenor-distributors are mesmerized by this catch phrase into supposing that the Commission's responsibility is discharged with that limited inquiry and if unsatisfied on that score, it is free to reject out of hand a producer's application for a new service." (R. 627)

The court below pointed out that the Commission does not fulfill its statutory duty by a limited inquiry into the "in-line" price, stating:

> "To be sure, if the proposed price is not 'in-line' this may become the dominant factor in denying the appli-

> cation. But it must be done as a part of the larger element of 'public convenience and necessity'." (R. 628)

Time and again the court below emphasized that the Commission is required by *statute* to determine whether a proposed sale is in the public convenience and necessity and that this broad term means more than the limited inquiry into whether the price is "in-line".[28] The court below admonished the Commission:

> "The task facing the Commission in this developing field calls for innovation and adaptation. It is not, therefore, enough merely to inquire whether the price is 'in-line'. On the other hand, for § 7 purposes, there need not be a full dress § 4 or § 5 rate hearing. The Commission must, however, hear and evaluate all relevant evidence bearing on public convenience and necessity when it is urged, or held, that the proposed price is out of line." (R. 632)

5. Justification Offered by Petitioners for Excluding the Proffered Evidence

Petitioners have employed what might be called the "negative defense" to support their position that cost, economic and other evidence should not be permitted in producer certificate proceedings for the purpose of determining the public convenience and necessity price. The principal reason given to justify not receiving such evidence is that it would defeat administrative expediency, or stated differently, to

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[28] The court below expressed surprise that the Commission was determined to remain in blissful ignorance of our changing times: population centers are increasing at a tremendous rate; demand for natural gas is increasing; where is the supply and how will it be satisfied; what revenues will be needed to find a large enough gas supply to satisfy the ever increasing demand, etc. (R. 629).

receive and consider such evidence requires additional time and effort. To a lesser extent, Petitioners also argue that such cost and economic evidence is duplicative of evidence being received in area rate proceedings. Finally, Petitioners urge that producers will not be hurt by limiting evidence in certificate proceedings to the determination of an "in-line" price because in the normal situation[29] they can reject the certificate offered by the Commission if they believe the "in-line" price is too low.

The Commission has apparently concluded that if one shred of evidence other than evidence of prices being paid to other producers in the same area during the same time period is admitted that an administrative monstrosity will result. This is not true. The Commission admitted and thoroughly cross-examined cost and economic evidence similar to the evidence now in dispute in the proceedings underlying Opinion No. 351,[30] Opinion No. 362,[31] and Opinion No. 399[32] without a "monstrosity" resulting. Under current Commission procedure, there are between 60 and 80 applications from a contiguous geographical area consolidated and set for hearing. Even fewer producers are involved since many producers have more than one application. Out of this number there are usually not more than a dozen producer counsel in any one hearing.[33] The majority of the evidence is presented on a joint basis by the producers, *i.e.*, the producers all support the same witness. For

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[29] In this case the producers were not given the opportunity to reject the conditioned certificates.

[30] *Continental Oil Co.*, Opinion No. 351, 27 FPC 96 (1962).

[31] *Skelly Oil Co.*, Opinion No. 362, 28 FPC 401 (1962).

[32] *United Gas Pipe Line Co.*, Opinion No. 399, 30 FPC 329 (1963).

[33] Many of the producers are not represented in these hearings and do not participate in the administrative process, preferring to take whatever price is awarded them, no matter how low.

example, in Opinion No. 351, which was the *CATCO* remand, Continental Oil Company, one of the four *CATCO* producers, presented a cost of service presentation based on Continental's costs and made the assumption that the other three producers' costs were the same. Repeatedly, in Opinion No. 351, the Commission pointed out that Continental's presentation fell far short of the type of proof required for § 4 or § 5 proceedings. The producers, as well as the Commission, have accumulated considerable experience since the early days of producer regulation and know that it is not necessary for each producer to present, for example, separate witnesses on cost trends, production depths, etc. The producers have little difficulty in making joint presentations on problems common to each.[34] Given any guidance from the Commission, the producers in this case would have made more joint presentations with less duplications than they did. A dogmatic "no evidence" approach is not the answer required to avoid the detailed intricacies of a "just and reasonable" rate determination. Considerations of administrative convenience should not be used to deny the admissibility of relevant evidence or to deny a certificate applicant the opportunity to show the reason why a proposed price is in the present or future public convenience and necessity.

New York and UGI, *et al,* in their briefs before this Court have attempted to inject the idea that the producers prefer protracted certificate proceedings.[35] Apparently this theory is premised on the hypothesis that the Commission issues temporary certificates *ex parte* to producers at whatever price the producers request, and that if the producers

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[34] In these consolidated proceedings each producer is entitled to rely on *all* of the evidence presented.

[35] Brief for the Public Service Commission of the State of New York, pp. 20-21; Brief for the United Gas Improvement Co., et al, pp. 28-30.

impede the hearings on the applications for permanent certificates that they can continue to collect "excessive" prices under temporary certificates for longer periods. First, the Commission does not grant temporary certificates at whatever prices the producers seek and has the full power which it frequently uses to condition temporary certificates to lower prices. In the second place, the Commission could insert refund conditions in temporary certificates with a floor at a level satisfactory to the Intervenors so that the producers could collect their full contract prices during the pendency of the temporary certificates. If it was later determined that the price was too high the producer would then refund the excessive amounts collected. The Commission also frequently utilizes this latter procedure.[36] Intervenors would virtually eliminate producer certificate proceedings rather than require the Commission to properly exercise its discretion in issuing temporary certificates.

Incidental to their delay argument, Intervenors state that protracted hearings will result in the producers collecting excessive prices for long periods to the detriment of the consumer even if the excess price is later refunded. This is an unusual argument since the alternative approach which they advocate is to develop a procedure to issue permanent certificates quickly at lower prices and then let the producer immediately file for rate increases which will be suspended and collected subject to refund. Under either system, interstate pipelines may pay prices subject to refund for long periods. However, the producer greatly benefits by having an early opportunity to seek a *firm* price at a level which he thinks is justified. On brief

[36] Of course, if the Commission does not insert refund conditions in temporary certificates which the Intervenors believe are necessary, then they may appeal such action to the courts.

in this Court, the Commission very eloquently states why the producers want a firm price not subject to refund as soon as possible.[37]

> "For very sound economic reasons, many producers wish to commence service at a firm price rather than run the risk of the indefinite and potentially large refund obligations which could result if they were certificated at contract rates subject to a refund condition should these rates ultimately prove unjustified. If they know the price is free and clear, they can release funds for operational purposes, make necessary payments to royalty owners (who often are entitled to a percentage of the sales price) and meet their obligations under State taxing statutes (which in many areas are calculated at a percentage of producer revenues)."[38]

New York sponsors the duplicative evidence argument, which is: why allow the producers to introduce cost and economic evidence in a certificate proceeding when the same type of evidence can be heard in an area rate proceeding! The Commission examiners, now with the approval of the Commission in the Permian Basin area rate case,[39] have systematically excluded all individual cost and economic evidence in the area rate proceedings. For a small producer

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[37] Brief for FPC, p. 18.

[38] The Permian Rate proceeding just completed took 5 years and approximately 250 hearing days to complete. The Southern Louisiana Area Rate proceeding now in progress has completed approximately 260 hearing days as of this date. Consider this in contrast to the hearing days in the three opinions in which cost evidence was admitted: Opinion No. 351 (48 days); Opinion No. 362 (10 days); Opinion No. 399 (23 days). Is it any wonder that: "Thus in the nine in-line determinations made prior to the present opinion, of a total of 87 sales whose initial price was set below contract levels, only 13 have subsequently filed for higher rates, either to the original contract level or to take advantage of periodic escalations subsequently coming due." Brief for FPC, p. 19.

[39] *Area Rate Proceeding*, Opinion No. 468, ... FPC ..... (1965).

such as ODECO with only a few sales, this duplicative evidence argument is devastating since the Commission will never have any evidence before it in either certificate or rate proceedings which would show what the price set by the Commission does to the small producer. In any event, the evidence which the producers want the Commission to consider in a certificate proceeding is not the evidence of the kind and quality necessary to find a just and reasonable rate such as is now being considered in the area rate proceedings. The area rate proceeding evidence is much more extensive and sophisticated and, indeed, a small producer could not afford to make such costly presentations.

New York also suggests that the producers can reject a certificate in the usual situation or, in any event, they can file for a rate increase up to their contract price. The latter argument is, of course, subject to the qualification that there be no price moratorium such as the Commission and Intervenors are defending in this case. In any event, the producers' option to reject certificates is fictitious relief which this Court clearly recognized in its *CATCO* opinion when it stated, "Since some 90% of all commercial gas moves in the interstate market, . . ."[40] Almost all of the nation's natural gas supply comes from four or five states and these states can only absorb a limited amount of the natural gas produced within their borders. If a producer rejects one interstate sale he does so because he has found intrastate market. He cannot expect the Commission to offer any better terms if he once again offers his gas in the interstate market.

6. A Practical Remedy

The problem still remains — how to reconcile the two extremes — the Commission's theory that prices can be de-

[40] *Atlantic Ref. Co.* v. *Pubic Serv. Comm'n*, 360 U.S. 378, 394 (1959).

termined in a sterile "in line" vacuum versus the *"alleged"* intention of the producers to convert every §7 certificate proceeding into a § 4 or § 5 rate proceeding. ODECO suggests that with a little thought, a little time, and a little effort, particularly on the part of the Commission, that this problem can be resolved. ODECO and other producers have no objection to the determination of an "in-line" price. An "in-line" price properly determined is material and relevant in a Section 7 certificate case. Most producers would rather accept the "in-line" price than become engaged in an administrative hearing with an agency of the Federal government. ODECO suggests that the Commission continue to determine an "in-line" price in each certificate proceeding and hold that the producers can collect this price on a minimal showing, *i.e.*, after they have shown a need for the gas, that they are ready, willing and able to perform under their contracts according to the Natural Gas Act, and that the contracts were negotiated at arms' length.[41] It is only as to those producers who want something more than the "in-line" price that the Commission should admit additional evidence to give the producer the opportunity to prove he is entitled to a higher price. All ODECO asks is to be given the *opportunity* to shoulder the statutory *burden* by showing that its proposed price is consistent with the public convenience and necessity even if its proposed price exceeds an appropriately determined "in-line" price.

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[41] Apparently, the Commission contemplated this procedure at one time. See *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817, 820 (9th Cir. 1960), *cert. denied*, 365 U.S. 879 (1961) where the court stated:

> "It is apparently with reference to this principle that the Commission states in its brief: 'Where a proposed price is 'in line' a certificate issues on a minimal showing; where, however, the price is 'out of line' the applicant must make an extensive demonstration in support of his rate, else he suffers a certificate denial or a price reduction'."

II.

THE RECORD IS DEVOID OF ANY EVIDENCE TO SUPPORT THE 23.55¢ PER MCF PRICE INCREASE MORATORIUM IMPOSED BY THE COMMISSION

In the orders under review the Commission imposed a condition on the certificates issued to ODECO forbidding the filing of rate increases above 23.55¢ per Mcf until July 1, 1967 or the completion of the Southern Louisiana Area Rate proceeding, whichever is earlier. (R. 582) ODECO agrees with the court below that the Commission lacks statutory authority to impose such a price increase moratorium. However, the briefs concurrently filed by other respondents will thoroughly discuss this point so that further discussion by ODECO appears unnecessary.

In addition, ODECO points out that there is absolutely no evidence in the record to support the Commission's conclusion that triggering and price redeterminations will result from the filing of rate increases above 23.55¢ per Mcf.[42] The Commission does not attempt to show any evidence to support this conclusion.[43]

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[42] In fact, sales from the Southern Louisiana area have been made under permanent certificates issued by the Commission at firm prices of 24.05¢ per Mcf since 1959. See Opinion No. 321, *Trunkline Gas Co.*, Opinion No. 321, 21 FPC 704 (1959).

[43] This lack of evidence results from the fact that no party in the hearings before the Commission contended that such price increase moratorium should be imposed or presented evidence directed to the price at which triggering and price redeterminations would result. Therefore, the Presiding Examiner's decision does not even discuss the price increase moratorium question. This lack of notice and hearing alone is sufficient to vitiate the Commission's *sua sponte* imposition of a price increase moratorium.

Instead, the Commission argues that ODECO did not properly preserve this error in its application for rehearing before the Commission (Br. p. 44). In particular, the Commission cites a fragmentary portion of ODECO's application for rehearing and contends that ODECO failed to properly preserve the error now asserted.[44] ODECO submits that the Commission's attempt to hide behind this technicality is to no avail, since the point of error in its application for rehearing clearly and unequivocally raised the price increase moratorium issue and the lack of evidence to support the 23.55¢ per Mcf triggering level found by the Commission.[45]

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[44] The Commission also urges that ODECO had the burden to reopen the record to controvert the Commission's finding as to triggering and price redeterminations (Br. p. 44). This novel theory contradicts established precedent that the proponent of a certificate condition has the burden to support such condition by substantial evidence and soundly based findings in the record. *Pure Oil Co.* v. *FPC*, 292 F. 2d 350, 352 (7th Cir., 1961). Until such supporting evidence was presented, ODECO had no burden to adduce evidence to controvert the Commission's unsupported "finding."

[45] The pertinent portion of ODECO's application for rehearing provides as follows:

> "The Commission has erred and has exceeded its authority in Ordering Paragraph (C) providing a moratorium on the filing of all price increases in excess of 23.55¢ per MCF pending the issuance of a final decision in the area rate proceeding in Docket No. AR61-2 or until July 1, 1967, whichever is earlier.
>
> "There is no evidence in the record before the Commission which pertains to the effect of filing by Odeco of its contractual price increase." (R. 603).

A reading of the full point of error (R. 603-606) removes any doubt that ODECO adequately raised the issue now asserted.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the opinion of the court below be affirmed except insofar as it affirms the Commission's power to refund amounts previously collected pursuant to unconditional permanent certificates.

Respectfully submitted,

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September 30, 1965